SUPREME COURT, U.S.

SEP 9 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Docket No. 445

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,
Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To The Honorable Earl C. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Lloyd W. McCorkle, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled cause on August 6, 1957, and amended August 19, 1957.

Opinions Below.

The opinion of the Court of Appeals for the Third Circuit, the court immediately below, has not as yet been officially reported. A copy is appended as Appendix A.

The opinion of the United States District Court, District of New Jersey, reversed by the Court of Appeals, is reported in *United States, ex rel. DeVita v. McCorkle*, 133 F. Supp. 169.

The opinion of the Supreme Court of New Jersey is reported in *State* v. *Grillo*, 16 N. J. 103, 106 A. 2d 294 (1954).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 6, 1957, and amended judgment entered August 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented.

1. Where, in the trial of three defendants for felony-murder (the killing of a police officer in the perpetration of the robbery of the manager of a super-market), the jury by its verdict recommended life imprisonment as to one but not as to the other two defendants, can the two defendants given the death penalty claim denial of due process of law because one of the jurors who sat at the trial (named Kuhnle), had failed, in his voir dire examination, to volunteer information that he had been a victim of an armed

robbery (his robbery-experience had occurred almost a year *before* the trial, and the information concerning his experience came to light about two years *after* the trial), particularly in view of the fact that the juror had not been asked the specific question concerning any robbery-experience (although the question was asked of some of the other jurors under voir dire examination, the question being asked of only 1 out of 9 jurors who *preceded* him, 7 of whom were more or less extensively examined, and of only 6 of out 71 jurors who *followed* him, 26 of whom were more or less extensively examined), and especially where the juror in question, in reply to specific questions asked of him on his ability to serve as a fair and impartial juror, directly and unqualifiedly avowed and gave assurance of his ability to consider the case solely upon the evidence, and that he could give no reason why he could not sit as a fair and impartial juror?

2. Where the juror in question, in his voir dire examination, was merely asked the question, "You don't know any State's officers or personnel?" and he answered the question in the negative (other jurors were asked questions concerning acquaintanceship with "members of the prosecutor's staff," or with State and County officials actively engaged in the investigation and preparation for trial of the murder case), can it be said that the juror willfully falsified his reply to the above question in view of the fact that he had made a casual acquaintance with some local police officers who, at about the time of his robbery-experience, had afforded him a nightly protective escort in going to the bank to make deposits for his employer?

Constitutional Provision Involved.

The constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States, the pertinent portion of which is as follows:

> Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement.

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment entered on August 6, 1957 and amended August 19, 1957, reversing the judgment of the United States District Court for the District of New Jersey and directing that the latter Court issue a writ of habeas corpus to the end that a new trial be allowed.

The facts upon which petitioner relies, spelled out in some detail in the opinions of the District Court and of the Court below, are as follows:

On March 8, 1952, Silvio DeVita, Joseph Grillo and Ralph Rosania, were tried and convicted of murder in the first degree in the Essex County Court, New Jersey.

The crime was a felony-murder, the killing of James Law, a special officer, on November 9, 1951, in Newark, New Jersey, committed during the perpetration of robbery (the deceased was killed while in the act of escorting the manager of a super-market who was carrying a substantial sum of money to a bank for deposit).

By its verdict, the trial jury recommended life imprisonment as to the defendant Rosania only, but it made no recommendation as to the defendants DeVita and Grillo.

Accordingly, on March 12, the death penalty was imposed upon DeVita and Grillo.

The New Jersey Supreme Court affirmed the judgment of conviction as to DeVita and Grillo. (Rosania did not join in the appeal). See *State* v. *Grillo*, 11 N. J. 173, 93 A. 2d 328).

This Court denied certiorari. (See *DeVita and Grillo* v. *New Jersey*, 345 U. S. 976, 73 S. Ct. 1123).

In March, 1954 (two years after the conviction), DeVita and Grillo applied to the trial court for a new trial upon the ground of "newly discovered information" that on March 30, 1951 (almost a year before the trial) one of the members of the jury, named Arthur Kuhnle, had been the victim of an armed robbery; that the information had not theretofore come to the knowledge of defendants (nor did the prosecuting authorities have such information); that in Kuhnle's voir dire examination, although he had not been asked the specific question as to whether he had ever been the victim of a robbery, he heard, or should have heard, the question asked of another prospective juror examined before him, and while seated in the jury box after his acceptance as a juror, he heard, or should have heard, the question asked

of other prospective jurors who followed him (the specific question was asked of only one juror out of nine talesmen called before him, seven of whom were more or less extensively examined; and of the 71 talesmen called after Kuhnle, only six were asked the specific question out of 26 or more or less extensively examined); that Kuhnle denied he knew any "State's officers or personnel;" and that as a consequence juror Kuhnle was a biased and prejudiced juror and defendants were thereby denied due process of law.

On March 25, 1954, the trial court denied their motion for a new trial.

The New Jersey Supreme Court affirmed the denial of a new trial (see *State* v. *Grillo*, 16 N. J. 103, 106 A. 2d 294).

On August 16, 1954, DeVita applied to the United States District Court for a writ of habeas corpus, claiming he was denied due process because of juror Kuhnle's "Fraudulent concealment" of the fact that he had been the victim of an armed robbery, and that he had falsely answered the question whether he knew "any State's officers or personnel," claiming that at the time of his robbery-experience in March, 1951 he had the benefit of police escort in making his nightly deposits in the bank for his employer (his escort consisted of local police officers furnished by the Newark police).

On August 16, 1954, the same day of defendants' application for a writ of habeas corpus, the District Court judge, after examining the opinion of the New Jersey Supreme Court in 16 N. J. 103, dismissed the petition, but he issued a certificate of probable cause entitling defendants to an appeal.

On appeal, the Court of Appeals remanded the cause to the District Court for further proceedings directing that

the Court examine and consider the "entire record" of the State courts pursuant to *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397 (1953). (See *United States* v. *McCorkle*, 216 F. 2d 743).

Pursuant to the direction, the District Court, on remand of the case, thoroughly examined and considered the entire record of the New Jersey state courts, and it concluded that the federal questions involved had been adequately considered and determined by the New Jersey Supreme Court, and on July 25, 1955, the District Court dismissed the petition for habeas corpus. (See *United States* v. *McCorkle*, 133 F. Supp. 169).

On appeal, oral argument was had before a three-judge Court on February 9, 1956.

Thereafter a re-argument was had before the entire seven-judge Court of Appeals on January 9, 1957.

On August 6, 1957, and by amended judgment of August 19, 1957, the Court of Appeals reversed the judgment of the District Court by a vote of four to three, and directed the issuance of a writ of habeas corpus to the end that a new trial be allowed.

Reasons for Granting the Writ.

We respectfully submit that:

1. The Court of Appeals, by a vote of four to three, has decided an important question of federal law which has not been, but should be, clearly and definitely settled by this Court.

2. The decision of the Court of Appeals is in direct conflict with the decision in the instant case of the Supreme

Court of New Jersey, the highest State court, concerning the federal questions presented. The decision of the United States District Court, which was reversed by the Court of Appeals, had approved of the decision of the New Jersey Supreme Court.

3. Clearly, the questions presented are of great importance in the administration of the criminal laws of not only the State of New Jersey but of every State of the union.

Following is a brief presentation of the argument in support of our contention that the decision of the Court of Appeals is erroneous and that of the New Jersey Supreme Court is believed to be correct.

a. As to the alleged "fraudulent concealment" of the fact of Kuhnle's robbery-experience.

The murder trial consumed twelve full days between February 25 and March 8, 1952.

The voir dire examination of prospective jurors consumed the first two days, February 25 and 26, 1952.

This, briefly, is what transpired in the voir dire examination, upon a careful examination of the trial record.

In the morning session of the first day, February 25, there were nine prospective jurors called, of whom two were excused by consent, and seven examined extensively. Of the latter, one was excused for cause, three were excused peremptorily, and three were accepted as jurors.

Of the nine talesmen called, and of the seven examined extensively, only one juror (No. 6, Mr. Clifford L. Gould) was asked a specific question relating to personal experience as a victim of robbery, as follows (p. 100):

"Q. Has anyone ever attempted to commit robbery against you or any member of your family? A. No, sir."

The juror was excused peremptorily by the State.

In the afternoon session of the first day, the first juror to be called was Mr. Arthur Kuhnle (No. 10), the juror here under consideration.

Kuhnle was first examined by counsel for defendant Grillo. He affirmed that although he had read newspaper accounts of the crime, he had formed no opinion as to guilt or innocence; he could approach the case with an open mind; and he would give the defendant Grillo (who had fired the fatal shot) the benefit of any reasonable doubt arising from the evidence. He was asked the following pertinent questions, and he gave the following answers:

"Q. Do you know of any reason why you cannot sit as a juror in this case? A. No, I know of none.

"Q. Does the fact that the person who was killed happened to be a special officer create in your mind any prejudice against the defendants? A. No.

"Q. Can you, if selected, try this case without any prejudice, without any passion against the defendants and with a clear, open mind decide it fairly upon the evidence? A. Yes, sir."

He was next examined by counsel for DeVita, as follows:

"Q. You heard the interrogations this morning, did you not? A. Yes, sir.

"Q. Let me repeat to you my position with respect to the client I represent, Mr. DeVita. I am interested in only one thing in this inquiry into the competency of the jurors and that is that the jury who finally occupy the box to try this case is open-

minded, free of any prejudice of any kind, nature or description whether it be because the man who was killed was a policeman or an officer of the law, whether the nationality of the defendants—anything at all that you might think of that would prejudice you?" A. I would have no prejudice at all."

Kuhnle was asked on the question of recommendation of life imprisonment:

> "Q. You think you could approach this case which is under consideration: that is, that there are three defendants all charged under the theory of the State's case with murder in the first degree. I think the evidence will show that one of the three is the man who actually fired the shot which killed Mr. Law. Do you think you will be able as a juror to differentiate between the three defendants and, if you find all three guilty of murder in the first degree, be able to follow the second part of your right, namely to recommend life imprisonment for one or two or all three of them notwithstanding the fact that one of them actually fired the shot? A. I think so."

He was next examined by counsel for Rosania. After stating he had formed no opinion of guilt or innocence from newspaper accounts of the crime or from discussion of the case with others, and that his mind was open, free and unprejudiced, he affirmed:

> "Q. Do you know of any reason that you can give why you could not sit as a fair and impartial juror in this case and be guided only by the evidence and the charge of his Honor? A. I know of no reason, sir, no."

Throughout his entire examination, Kuhnle was not asked any specific question as to whether he or any member of his family had ever been the victim of a robbery, as was

asked of only one juror No. 6 (Mr. Gould) called before Kuhnle.

After Kuhnle, there were 71 talesmen called for examination. There were 81 called altogether, Kuhnle being the 10th called for examination, and eventually he became Juror No. 5 in the jury box.

Of the entire 81 called, 33 were examined more or less extensively, the remaining 48 being subjected to little or no examination at all, and they were excused by the court or by consent of counsel.

Of the 33 who were examined more or less extensively, seven of them preceded Kuhnle, and 26 followed him.

Of those 33, 19 were excused either for cause or peremptorily, and 14 were accepted for jury service (including two alternates).

Of the jurors who followed Kuhnle, only six were asked a specific question as to any robbery-experience. (Nos. 13, 24, 36, 38, 46 and 76).

Only one person, a lady, No. 13 called, stated that such an incident had occurred some 15 years before, that she knew very little about the affair, and that she was in no way influenced by the incident. She was excused peremptorily by counsel for DeVita after she stated she had formed an opinion on the case after reading newspaper accounts and that her opinion could not be changed by the evidence.

Of the seven jurors who were asked the specific question about robbery-experience, and none of these had had any such experience, three were accepted as jurors (Nos. 24, 36 and 76), and four were rejected (Nos. 6, 13, 38 and 46).

To summarize: out of a grand total of 81 talesmen called, only 33 were examined more or less extensively, seven before, and 26 after Kuhnle; of the seven thus examined *before* him, only one juror was asked the specific question on robbery-experience; and of the 26 thus examined *after* him, only six jurors were asked the specific question.

Under these circumstances, assuming that Kuhnle had given his experience any thought, which was highly improbable because of the lapse of 11 months since its occurrence, how can it be said that Kuhnle had "fraudulently concealed" his experience, since he was never asked the specific question, and of the 81 talesman called only one out of nine examined *before* him and only six of the 71 *after* him had been asked the specific question, particularly in the face of Kuhnle's unconditional and unequivocal avowal of his ability to sit as a fair and impartial juror with a free and open mind and without any passion or prejudice?

The same constitutional issue of denial of due process based upon Kuhnle's presence on the trial jury under the circumstances described was presented to the New Jersey Supreme Court (*State* v. *Grillo*, 16 N. J. 103); and the New Jersey Supreme Court concluded that, since counsel usually have a wide latitude in the voir dire examination of prospective jurors proper diligence would have brought to light the incident of Kuhnle's robbery-experience; that under the State Rules of Practice and Procedure defense counsel were furnished a list of the panel of jurors at least three days before trial; that Kuhnle's failure to volunteer the information of his robbery-experience was not a *fraud in law* even though it was indicated by the question asked of only seven out of a total of 81 talesman called and 33 ex-

tensively examined that robbery-experience was the information sought to be elicited; and it was decided by the New Jersey Supreme Court that Kuhnle's failure of disclosure, under the circumstances, could not be regarded as "imputed fraud."

This is what the New Jersey Supreme Court said on the question of "imputed" fraud or bias (p. 113 of *State* v. *Grillo*, 16 N. J.):

> "The sole question here is whether bias may be imputed to a juror in despite of his sworn statement that he was not biased (Kuhnle repeatedly averred in his examination that he was free from bias, prejudice or partiality), upon the mere showing that the juror at a time in the past had been a victim of armed robbery. (Citing and quoting from Frazier *v.* United States, 335 U. S. 497, 512-513, 69 S. Ct. 201, 210, 93 L. Ed. 187, 198-199, 1948).
>
> "On the merits there is no charge in this case of actual bias, and the imputation of bias to Kuhnle, as a matter of law, because he once had been the victim of highway robbery is only surmise and speculation and ' * * would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.' Dennis *v.* United States, 339 U. S. 162, 167, 70 S. Ct. 519, 521, 94 L. Ed. 734, 740 (1950); United States *v.* Wood, 299 U. S. 123, 149-150, 57 S. Ct. 177, 81 L. Ed. 78, 90. (1936). *The law assumes that every citizen is equally interested in the enforcement of the criminal law.* Cf. Connors *v.* United States, 158 U. S. 408, 413-414, 15 S. Ct. 951, 39 L. Ed. 1033, 1035 (1895). There is no case made here that the facts are such as in law necessarily raise the presumption of partiality. Cf. Ex parte Spies, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80, 90 (1887). * * *" (Emphasis supplied.)

The New Jersey Supreme Court also pointed out that, even assuming that Kuhnle's failure of disclosure of his robbery-experience furnished a basis for "imputed bias," the situation is not as strong as the case of a juror's "preconceived opinion of guilt" which, under New Jersey law, would not be ground for a challenge for cause, where the juror affirms his ability to render a verdict based upon the evidence and he professes no malice or ill will against the accused. (Citing *State* v. *Jefferson*, 131 N. J. L. 70, 72, E. & A. 1943; *State* v. *Stephan*, 118 N. J. L. 592, 603, E. & A. 1937; *Wilson* v. *State*, 60 N. J. L. 171, 182, E. & A. 1897. Cf. *Ex parte Spies*, 123 U. S. 131, 177, 8 S. Ct. 22, 29, 31 L. Ed. 80, 90, 1887).

We think, too, that the United States District Court properly concluded that Kuhnle's failure of disclosure of his robbery-experience was not such a "fraudulent misconduct" as to warrant a new trial because, as the Court pointed out, in the case where the juror was not asked the question on his voir dire, either specifically or in substance, a defendant is not entitled to a new trial unless he shows one of the following: that the undisclosed information conclusively establishes a disqualification as *matter of law*; or the juror is affirmatively shown to be biased; or that he concealed the information intentionally; or that he misled counsel intentionally.

Both the New Jersey Supreme Court and the District Court properly concluded that juror Kuhnle, in his voir dire examination, did not fraudulently conceal the information of robbery-experience so as to constitute a "fraud in law" or even an "imputed fraud;" that defense counsel had in their possession a list of the prospective jurors at least three days before the trial during which they had ample

opportunity to explore Kuhnle's background; that defense counsel had the same opportunity to ask Kuhnle the direct question that was asked of some of the other jurors (the specific question was asked of only seven jurors, one *before* and six *after* Kuhnle, out of a total of 33 who were more or less extensively examined out of a grand total of 81 called for examination) and failure to ask the question amounted to a lack of due diligence; and that Kuhnle gave clear and direct replies to all questions asked of him and gave positive assurance of his ability to sit as a fair and impartial juror and could decide the case upon the evidence.

The following excerpt from the dissenting opinion of Judge Kalodner in the Court of Appeals concurred in by Judges Maris and Goodrich) is most significant on the question here under discussion:

> "As the trial judge properly charged the jury, the crime of all three men was of a piece if Rosania had not withdrawn from the holdup plan before the shooting, and his mere absence from the scene at the time of the shooting was not a critical circumstance. The fact that the jury made a merciful recommendation of life imprisonment amply demonstrates that it was not a prejudiced jury; far from that fact, it could well be said, under the circumstances overwhelmingly established by the evidence, that it was indeed merciful to a fault.
>
> "Kuhnle's participation in the merciful recommendation is eloquent testimony of an absence of prejudice on his part in the DeVita-Grillo-Rosania trial and is a dispositive answer to the critical focal point of the majority's position that the only real issue at the trial of the defendants was 'whether the jury should recommend life imprisonment' and that Kuhnle was so biased and prejudiced that he could not have fairly decided that issue.

> "The majority's determination that Kuhnle was so biased as to pollute the stream of justice in violation of due process seems to me to be insupportable in view of the fact that he and the jury of which he was a member recommended life imprisonment for Rosania."

We respectfully submit that, under the circumstances of Kuhnle's voir dire examination, it cannot be said that Kuhnle intentionally or willfully withheld the information of his past robbery-experience, or that his failure to disclose the information was tantamount to a "Fraudulent concealment" of a material fact sufficient to disqualify him as a juror as "matter of law," with the resultant consequence that defendants were denied due process of law.

A careful examination of cases in which a new trial was awarded because of a juror's after-discovered disqualification may be grouped into three classes; namely, (1) where a juror was disqualified "as matter of law;" (2) where the juror was unquestionably guilty of falsifying his replies to *direct* questions asked of him on his voir dire; and (3) where the juror deliberately "intruded" himself upon the jury with a pre-conceived intention of defeating justice.

The instant case does not fall under any of those classes.

In the instant case, defense counsel were in possession of a list of the jurors at least three days before the trial,[1] which afforded ample opportunity to investigate Kuhnle's background and fitness as a juror.

We respectfully submit that the following cases and authorities may well be applied to the instant case.

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(1) Under R. R. 3:7-2(a) of the New Jersey Rules of Practice & Procedure: "Any person who shall be indicted for * * * murder * * * shall have a list of the jury delivered to him at least 3 days before the trial."

In *Frazier* v. *U. S.*, 335 U. S. 497, 69 S. Ct. 201 (1948), defendant, who was convicted under the Harrison Narcotics Act, claimed denial of a fair and impartial trial because, as he learned after trial, one juror and the wife of another juror were government employees, and it was held that, in the absence of a proper challenge, they were not so prejudiced as "matter of law" as to require a new trial.

In *Bush* v. *U. S.*, 16 F. (2d) 709 (5th Cir. 1927) (unlawful sale of narcotics by a physician), defendant discovered after trial that one of the jurors was then under criminal charges which was sufficient to disqualify him. On their voir dire all of the jurors were merely asked if they knew of any reason why they could not serve as competent jurors. The juror in question failed to disclose that he was under criminal charges, and no specific question was asked of him to elicit the information. In refusing a new trial, the court said it was not shown that the juror was "guilty of fraud" and it was doubtful that any objection would have been made even if defendant had known of the juror's ineligibility; but, in any circumstance the objection came too late after the verdict, and the trial court was "well within its discretion to refuse a new trial."

In *Johnson* v. *U. S.*, 225 U. S. 405, 32 S. Ct. 748 (1912), where defendant was convicted of murder with the death penalty, a new trial was applied for because of the alleged disqualifying bias of a juror, and it was held that the statute empowering the trial court to set aside a verdict upon such a ground did not permit the defendant to make the claim on appeal that the jury had been drawn unlawfully, but he was required to raise the question of bias on the juror's voir dire examination, and that the trial court's determination involved a broad discretion subject only to the essential demands of justice.

In *State* v. *Figuli*, 36 N. E. (2d) 19 (Ohio Ct. App. 1938), the defendant was tried and convicted of killing a police officer during the holdup of a bank. After conviction, he discovered that one of the jurors was the brother of a man present in the bank at the time of the crime. The claim was that, although the juror was not asked any direct question on his relationship, he was asked whether he knew of anything, suggested to him or not, which would prevent him from sitting as a fair and impartial juror, and the juror replied in the negative. Defendant claimed that the question called for a disclosure of the relationship and defendant would have excused him. It was held that the fact that the juror was a brother of the man in the bank was not sufficient ground for a challenge for cause, and that the failure and omission of any specific inquiry "waives all objections to the juror's competency, which in the exercise of reasonable diligence could have been ascertained."

In *People* v. *Cosmo*, 205 N. Y. 91 (Ct. App. 1912), where the defendant was convicted of 1st-degree murder, defendant claimed that one of the jurors lacked the requirement of property ownership and was therefore disqualified as matter of law. In affirming the trial court's refusal to grant a new trial, the Court held that defendant was in nowise prejudiced by the juror's disqualification; that the disqualification could have been discovered by a "few questions" asked on his voir dire examination; that even though a capital case was involved, "it would be trifling with the administration of justice to hold that a defendant is entitled to a new trial in these circumstances;" and that defendant was accorded everything guaranteed to him by the Constitution when he was tried according to established rules of law and his guilt established by competent and sufficient evidence before a

jury of twelve men who were capable of deciding his case fairly and impartially.

See, also, *Wharton's Crim. Proc.* (10th Ed.), Vol. III, sec. 1785, p. 2237; *Thompson on Trials* (2d Ed.), Vol. I, sec. 116, p. 134; 31 *Amer. Juris.*, "Jury," secs. 104, 107, 108, pp. 635, 636, 638; 39 *Amer. Juris.*, "New Trial," sec. 39, p. 59.

b. As to the alleged falsity of Kuhnle's reply to the question whether he knew any "State's officers or personnel."

Toward the end of Kuhnle's voir dire examination, Rosania's counsel asked him:

> "Q. You don't know any of the State's officers or personnel? A. No, sir."

Defendants claimed that the reply was a false one, and in support of their claim they submitted to the State's courts in connection with their motion for a new trial a newspaper account of Kuhnle's robbery-experience in March, 1951 to the effect that, "According to the police, Kuhnle ordinarily called for a police escort each night," and that after the holdup three detectives of the Newark police department questioned him in connection with the police investigation. The newspaper account was also submitted to the District Court in the habeas corpus proceeding and formed part of the record in the Court below.

An examination of the record of the voir dire examination of all the jurors will disclose that a number of the jurors were asked specifically if they knew "any member of the prosecutor's staff," or "any prosecuting official," or "any officer directly connected with the prosecutor's office." Kuhnle was not asked any such question, the only question asked of him being the one above quoted.

From the tenor of those questions, what the defense attorneys were seeking was information concerning the juror's acquaintance with officers of the State or County who were actively engaged in the investigation and preparation for trial of the murder case against the defendants, and not the casual acquaintance the juror might have had with a local policeman, or, in connection with the Kuhnle incident, his casual acquaintance with any of the local police officers who had provided him with the police escort.

The New Jersey Supreme Court gave fair and adequate consideration to the claim, and concluded that what was meant by "State's officers or personnel" were State of New Jersey officials and not any local police officer.

This is what the New Jersey Supreme Court said on the subject (*State* v. *Grillo*, 16 N. J. 103, p. 115):

> "• • • Nevertheless, it is a fair inference that even if the juror had occasional city police protection, that he answered the question as any reasonable person would do when not versed in the law, namely that 'State's officers or personnel' meant State of New Jersey officials or employees and not City of Newark police or County of Essex officials. The question should have been lucidly submitted.
>
> "Even so, even if it meant otherwise, there is no evidence that that subject matter created a bias, prejudice or partial status in the mind of the juror."

We respectfully submit that in answering the question in the negative Kuhnle undoubtedly had in mind his acquaintance with any prosecuting official or officer connected with the prosecution of the murder case.

The District Court agreed with the conclusion of the New Jersey Supreme Court.

And, we think, the minority judges in the Court below properly concluded as follows:

> "It is not amiss to note that it was Rosania's counsel who had asked Kuhnle whether he knew any of the 'State's officers or personnel' and in the light of Kuhnle's joining his fellow jurors in the merciful life imprisonment recommendation as to Rosania, it is difficult to see how the majority can find fraudulent concealment or bias because of Kuhnle's negative answer to that question.
>
> "This may be a proper place too, to note that the majority's statement that '* * * it is now shown that he (Kuhnle) *knew a number of Newark police* since he ordinarily called for a police escort each night * * *' is based on surmise and surmise only. The only evidence on the score of Kuhnle's contact with policemen—contained in the newspaper clipping relating to his holdup—was that *prior* to it he 'ordinarily called for a police escort each night' and that subsequent to it he was interrogated by three detectives in the usual routine investigation. It would be just as reasonable to assume that it was the same policeman—covering his beat—who was Kuhnle's escort when he had one, and such a probability ought not to be summarily rejected in favor of a surmise which would provide the premise for branding Kuhnle as a scheming perpetrator of a fraud on the judicial process with three men's lives at stake in the offing."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully subimtted,

CHARLES V. WEBB, JR.,
Counsel for Petitioner,
Essex County Court House,
Newark 2, New Jersey.

Dated: August 28, 1957.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,726.

UNITED STATES OF AMERICA, *ex rel.*
SILVIO DEVITA,

Appellant,

vs.

LLOYD W. McCORKLE, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISON AT TRENTON, NEW JERSEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued February 9, 1956

Reargued January 8, 1957.

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

Opinion of the Court.

(Filed August 6, 1957.)

By McLAUGHLIN, *Circuit Judge*.

The problem here is whether there was fundamental unfairness in appellant's trial. Finally, and very late, it is conceded within this court that the same question was before the state court and that we are bound to decide the appeal on its merits. There remains only the suggestion that since Rosania, the third defendant, received a sentence

of life imprisonment the jury acted fairly, though it had as one of its members, a disqualified person. From the facts, even if the jury had consisted of twelve patently prejudiced people they still would have found a major differentiation between Rosania and the other defendants, DeVita and Grillo. The latter two committed the holdup, Grillo firing the fatal shot. Rosania, a former employee of the place which was robbed, had been in on the planning of the robbery but in the words of the trial court's charge to the convicting jury, "* * * *Ralph Rosania was not at the scene of the actual killing.*" (Emphasis supplied). That is obviously the reason why he was given a recommendation of mercy by the jury. In the situation it might be well to remember that preconceived vacuum conclusions must yield to the record in even this wretched case. "The proponent before the Court is not the petitioner but the Constitution of the United States."[1] Therefore the chain of events which makes it obligatory for us at this time to pass on the merits of the appeal should have been examined and faced up to prior to anyone attempting to reach a conclusion on the specific issue confronting us.

On March 30, 1951, juror Kuhnle, carrying a night deposit from the Western Union office where he was night manager, to the National State Bank, was held up on Broad Street, Newark, New Jersey, and robbed of $1,287.00. He regularly had a police escort when he made his nightly deposits. On November 9, 1951, seven months later, several blocks away on the same Broad Street, Thomas Lofrano, manager of the Universal Food Market, was taking his receipts to another Broad Street branch of the National State Bank for a nightly deposit. He and James Law, a uniformed special police officer, left the market and entered Law's automobile on Broad Street for that purpose. Appellant and Joseph Grillo held them up, took the receipts

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[1] Mr. Justice Harlan in *Chessman* v. *Teets*, . U. S. , opinion filed June 10, 1957, slip opinion page 9.

and in the course of the robbery Law was killed by a shot from Grillo's gun. Thereafter, "An investigation by the Newark police and the Essex County Prosecutor's office ensued, directed to the solution not only of the Law killing but of other then unsolved robberies in the area."[2] The petitioner, Grillo, and one Rosania, an accomplice, were quickly apprehended. They signed confessions, admitted the facts, and actually had no defense to the charge of murder under the New Jersey felony-murder statute. The real problem before the trial jury was whether its verdict should be "guilty" without any recommendation (in which event the death penalty was mandatory) or "guilty" with a recommendation of life imprisonment. Court, counsel and everyone else concerned were aware of this.

From the transcript of the voir dire of the 81 talesmen summoned, it is evident the defendants, through their counsel, sought to excuse from jury membership persons who had robbery experience, directly or indirectly, or close association or relationship with personnel of law enforcement agencies.

The State's effort was directed almost exclusively to keeping off the jury persons with scruples about capital punishment. This strongly pointed up the prosecution's primary objective, the obtaining of the death penalty against DeVita and Grillo. All defendants had offered to plead to the life-term offense.

Juror Kuhnle was the tenth talesman called and the fifth juror accepted. An earlier prospective juror had been queried on previous robbery experiences. Kuhnle's attention was directed to the questions put to the other panel members but he did not disclose that he had recently been held up and robbed. He was specifically asked whether he knew any of the State's officers or personnel. He an-

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[2] *State* v. *Grillo*, 11 N. J. 177-178.

swered in the negative although it is now shown that he knew a number of Newark police since he ordinarily called for a police escort each night and though his own holdup had been in all likelihood investigated and handled by the "Bandit Squad" of Newark police, as was the case to be tried.[3] During the selection of jurors for another day and a half, counsel for the defendants pleaded with the talesmen for frank disclosure of any possible source of prejudice, asking many of them if they had ever been robbed, etc., and if they had acquaintance or relationship with any law enforcement personnel, local, state or federal. One talesman mentioned a fifteen year earlier robbery experience; she was challenged and excluded. One mentioned relationship to someone working in the jail—excluded. A talesman knew a detective who had worked on the case; he was excused by consent. One, whose office in the vicinity of the holdup had been broken into, was excused by defendant Rosania. Two were excused because they worked in banks and the money robbed was being taken to a bank. Of one, the court said, "This gentleman carries considerable money in his business for his employer, and in fairness to the defendants I think I had better excuse him." Through all these incidents in his presence and hearing, juror Kuhnle sat quiet and in the course of the long questioning of seventy more talesmen failed to disclose his own robbery experience, his nightly journey to deposit his employer's receipts in the bank, or his acquaintance with a substantial number of police department personnel.

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[3] The far fetched assertion that the State's officers and personnel did not include the local police witnesses falls flat when it is remembered that the title of this matter as tried was "State of New Jersey v. Joseph Grillo, et als." and that ordinary reference in Essex County to the prosecution at a trial was and is to the "State," to the "State's case," to the "State's witnesses." The New Jersey State Police do not function in Newark or Essex County. They had no connection whatsoever with this trial. Colloquially speaking the only police officers associated with the prosecution of this indictment were the local Newark police. The others concerned were the Essex County Prosecutor, his assistants and his detectives. The latter are not usually called "police officers" but rather "prosecutor's detectives" or "county detectives."

The State's theory and modus operandi in trying the indictment was not calculated to leave the memory of juror Kuhnle's recent encounter at rest. There were remarks "to the effect that these defendants were members of an organized criminal group"[4] in Newark. The defendants and an undetermined number of their acquaintances of similar background were referred to repeatedly by the Prosecutor as "Associates, Inc." It was shown that one of the defendants had not worked for some months prior to the crime, but was financially affluent. The pistols used in the holdup was alluded to as the defendants "stock-in-trade" for some months prior to the crime. The following excerpt from the Prosecutor's summation to the jury vividly illustrates the position in which Kuhnle, as trial juror #5, had placed himself, whether he was striving to be impartial or not:

> "• • • The Associates Incorporated: Rosania, DeVita, Grillo, Cardone, Aulisi, Mucci, Angelo, Petrucci, Pontilla; the Associates Incorporated.
>
> "Why, they would stick you up, Mr. Juror No. 6, and you Mrs. Garrabrant, and you, Mr. George • • •."

After that amazing, violent assertion to the jury by the prosecutor, vividly reminding Kuhnle of his own ordeal, how could the latter have functioned other than short of the constitutional standard of impartiality.

When Kuhnle's history came to appellant's attention he sought relief in the state courts. His motion for a new trial, among other things, was founded on his affidavit which was part of the motion and which, after stating the previous robbery of Kuhnle and that he, DeVita had no knowledge of it during the trial, said, "Had I known of this fact, I would have requested my attorney, Edward R. McGlynn, to excuse said juror; I being of the opinion that such a juror, having been the victim of a holdup and this homicide having

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[4] *State* v. *Grillo*, 11 N. J. 173, 184.

occurred in a holdup, *the probability is that the said Arthur Kuhnle, as a juror, had a preconceived enmity, prejudice and bias against me and could not render an impartial verdict.*" (Emphasis supplied). Mr. McGlynn, DeVita's trial attorney in his affidavit, also part of the motion, said, "Had the said Arthur Kuhnle made *full and fair disclosure to me that he had been a victim of a robbery,* I would have interposed a challenge for cause and had the challenge been denied, I would have interposed a peremptory challenge to excuse the said Arthur Kuhnle as a juror in this cause." (Emphasis supplied):

The Grillo petition for a new trial which with the DeVita motion was handled as the one application by the trial judge itself alleged the known facts, that those facts "must have been known or at least should have been known to the prosecutor but [which] he did not disclose * * *" during the trial and that *Kuhnle "concealed" the facts on his voir dire.* In the argument on the Grillo petition which was titled in the names of Grillo and DeVita, counsel in connection with his offer of proof, urged that Kuhnle be subpoenaed to prove facts averred in the petition. The court, deeming that unnecessary, assumed some of the facts and proceeded to dispose of the contentions in the petition as follows:

> "There is no indication that the Prosecutor or any representative of the Prosecutor or of the State had any knowledge of the incident that occurred to Mr. Kuhnle in March, 1951 and therefore, I can give that suggestion no consideration.
>
> "* * * there was no obligation on Mr. Kuhnle's part to volunteer any information as to the incident, assuming, (which I do not feel we can do), that he even thought about it."

The court went on to hold that the allegation of bias of a juror after verdict under the circumstances would not be

entertained and proceeded to dismiss the suggestion as an "absurdity" in the following language:

> "If such a ground as this were considered by the Court some two years after the trial, the Court would be setting a precedent whereby after every conviction in a criminal case there might be a re-examination of the intimate life of every person who sat on the jury, going back an indeterminate space of time, and if that minute examination of the past life of any one of the twelve jurors revealed any information that might (not that would, but that might) have some bearing upon the juror's verdict, there would be established a ground for setting aside the verdict and granting a new trial. I think the mere statement of that proposition answers itself. The situation could be reduced to an absurdity."

In the appeal to the New Jersey Supreme Court the charge of bias against Kuhnle because he had himself been robbed shortly before and had concealed that fact which had been heard by the trial judge, was again urged. In addition, as a second reason for prejudice on the part of Kuhnle it was alleged that he had falsely denied he knew any of the State's officers or personnel. *There can be no doubt but that this second branch of the bias issue was also submitted.* The state court opinion at pages 114-115 reads;

> "Finally Grillo asserted on this appeal that Kuhnle had falsely denied that he knew 'any of the State's officers or personnel.' This point finds no support in the record except insofar as stated in the newspaper article referred to in Grillo's petition for new trial, namely: 'According to police, Kuhnle ordinarily called for a police escort each night.'
>
> "This point was not raised below and the juror was not heard thereon."

The comment of the court that Kuhnle had not been heard on the accusation that he knew the State's officers or personnel is interesting. He had not been heard on the charge of bias and concealment arising out of his own robbery either for the trial court had refused to have him brought in and examined. As to that charge the State Supreme Court held, page 114: "There is no case made here that the facts are such as in law *necessarily* raise the presumption of partiality." (Emphasis supplied.) If further proof of either or both charges had been needed by the State Supreme Court, that body had authority to order a hearing. New Jersey by its constitution provides that its Supreme Court shall have original jurisdiction of any cause before it.[5] Notwithstanding the court's above strong intimation of the possibility of establishing prejudice if proofs were permitted no hearing was ordered and no hearing was held. Petitioner as a practical matter had reached the end of New Jersey justice. The State Supreme Court took the same direction as and adopted the language of the trial court quoted above. Petitioner had to look elsewhere if any federal rights he possessed were to be upheld. Having unsuccessfully asked three justices of the United States Supreme Court for a stay of execution pending application for certiorari, he went into the district court where a stay was denied but a certificate of probable cause granted.

On appeal we reversed the district court and sent the matter back there for further proceedings in accord with *Brown* v. *Allen*, 344 U. S. 443 (1953). The district court examined the documentary evidence and *concluding no unusual circumstances existed* denied the petition for habeas corpus. That is the decision for our consideration on this appeal.

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[5] N. J. Const., Art. 6, § 3, ¶ 3:
"The Supreme Court * * * may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."

Appendix A—Opinion of the Court.

The issue before the district court was the biased fraud of Kuhnle in (1) concealing the fact that he had been robbed in much the same fashion and in the same vicinity seven months prior to the Law holdup; and (2) denying that he knew any of the State's officers or personnel connected with the trial. Each of these branches was of paramount concern to the defendants. Both were directly passed upon by the district judge. He held as to the first that "There is no proof that Kuhnle *intentionally* concealed any information or *intentionally* misled counsel." (Emphasis supplied). The court stated the second contention and its conclusion as follows:

> "The second allegation of fact is that Kuhnle told an untruth when he answered no to the question 'You don't know any of the State's officers or personnel?' According to the newspaper article describing the Kuhnle robbery incident, he ordinarily called for a police escort each night and subsequent to the robbery he was questioned by three Newark detectives. There is no contention that the Supreme Court of New Jersey did not give fair consideration to this issue and the offered evidence. Did that court reach a satisfactory conclusion in holding that even if Kuhnle '* * * had occasional city police protection, that he answered the question as any reasonable person would do when not versed in the law, namely that 'State's officers or personnel' meant State of New Jersey officials or employees and not City of Newark police or County of Essex officials. The question should have been lucidly submitted.'
>
> "This court agrees with that opinion. Additionally, in response to the form in which the question was asked, assuming Kuhnle did 'know' local police, he did not lie. He was not asked whether he knew any local officers or personnel, just as he was not asked if he ever had been a victim of a robbery. Thus,

for the reasons already set forth, this court concludes that DeVita has not been denied due process of law."

EXHAUSTION OF STATE REMEDIES.

The trial court said flatly it would not consider the allegation that the prosecution knew of Kuhnle's experience; it dismissed the allegation of "concealment" by the juror of his holdup as insufficient in law to warrant a new trial and threw out the relator's conclusion of "enmity, bias and prejudice" as unfounded and an "absurdity."

The New Jersey Supreme Court affirmed that decision and *entertained under its original jurisdiction the new charge that "Kuhnle had falsely denied that he knew any of 'the State's officers or personnel'"*. On this allegation that court, while it inferred that Kuhnle probably did not understand the query to include employees of the county—like the prosecutor or of the city—like the police, could not close the door to the inclusiveness of the phrase. In its dilemma the whole subject of Kuhnle knowing one or more of the law enforcement people connected with the state's case was eliminated by the comment that assuming such relationship there was no evidence it caused Kuhnle to be prejudiced.[8] With the possibility of this grave condition admitted, the state court may have been content in that decision to forget about it as it had regarding the admitted possibility of bias stemming from the robbery discussed above. However, under *Brown* v. *Allen*, *supra*, we cannot do that for it would be monstrous to pretend that the state has given fair con-

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[8] The court said:

"* * * it is a fair inference that even if the juror had occasional city police protection, that he answered the question as any reasonable person would do when not versed in the law, namely that 'State's officers or personnel' meant State of New Jersey officials or employees and not City of Newark police or County of Essex officials. The question should have been lucidly submitted.

"*Even so, even if it meant otherwise*—there is no evidence that that subject matter created a bias, prejudice or partial status in the mind of the juror." (Emphasis supplied.)

sideration to this part of the prejudice claim and reached a satisfactory conclusion.

The relator's New Jersey proceeding which contained all the allegations that are before us was there held insufficient in law to warrant a new trial. The state process had therefore been exhausted without relief for relator by the week of August 15, 1954 when he invoked the federal remedy.

THE WRIT SHOULD ISSUE NOW.

Under the law as it is today, both federal and New Jersey, the admitted facts demonstrate bias to the extent that it voids the process. Appellant's allegations are so substantial that the State Supreme Court, later approved by the federal district court, could only remark that "they do not *necessarily* raise the presumption of partiality." (Emphasis supplied). During its last term the United States Supreme Court set aside a conviction because of an experience to a juror which was far less impressive than the Kuhnle incident and though the juror *testified* that he was unprejudiced.[1] *Remmer* v. *United States*, 350 U. S. 377 (1956).

The New Jersey Supreme Court, on the closely related question of whether a verdict is invalidated where a sitting juror is interested in a similar type of case, recently sharply receded from its decision in this matter when in *Wright* v. *Bernstein*, 23 N. J. 284 (1957), that court set aside an $82,000 judgment on the ground that a juror failed to disclose on his voir dire that his mother had a personal injury action pending. There the juror had been interro-

[1] Long ago, Chief Justice Marshall ruled that a person "may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury; because it suspects prejudice; because in general, persons in a similar situation would feel prejudice." *United States* v. *Burr*, 25 Fed. Cas. 30 (1807).

gated after the verdict and there had been affirmative findings that he in good faith had misunderstood the question on the voir dire and had acted fairly in weighing the evidence. There also only a five-sixth majority of the jury was needed to render a valid verdict. It is most noteworthy that the justices who had dissented to the *Grillo* opinion were of the majority in *Wright v. Bernstein, supra,* and that the writer of *Grillo* dissented. That the law of the *Grillo* case gave very little trouble to the same court in *Wright v. Bernstein* appears from the opinion, page 294:

> "The appellant argues the misleading and deceptive information here relied on was properly elicited in an authorized proceeding conducted before the court, under its direction and by virtue of its authority and appellant had the right to rely upon the answer given as one given fully and truthfully; that in the instant matter the juror in question was individually interrogated and the questions addressed to him were simple in nature and clear in import *which was not the case in State v. Grillo,* 16 N. J. 103 (1954); Olivo *v.* Strand Engineering, Inc., 30 N. J. Super. 544 (App. Div. 1954); Springdale Park *v.* Andriotis, supra.
>
> "The misconduct here complained of is not a failure to answer a question improperly presented and unclear in nature but rather is that the answer given by design or otherwise was deceptive and misleading. As we see it there can be no doubt had the prospective juror answered the inquiry truthfully, he would have been peremptorily challenged, if the court overruled a challenge for cause. Therefore, the question is whether the right of challenge was denied by the prospective juror's failure to disclose the information sought pertinent and necessary to the decision of counsel. On the question of challenge

it is the prospective juror's state of mind with relation to the issue to be tried, and his predilections that were relevant to the inquiry of fitness." (Emphasis supplied.)

What was clear or unclear to the *Wright* v. *Bernstein* juror is irrelevant under that court's own reasoning for either way the party was misled by the answer.

The Tennessee Supreme Court in circumstances much like the cause at bar set aside a conviction under an "impartial jury" guarantee in the State Constitution. *Durham* v. *State* (Tenn. S. C. 1945), 182 Tenn. 577; 188 S. W. 2d 555; 160 A. L. R. 745.[8] See also *Kerr* v. *B. F. Goodrich Co.*, 31 N. E. 709, 712 (Ct. App. Ohio 1936).

The assurance of an impartial tribunal is too vital to be subjected to speculation concerning the quantum of prejudice flowing from this grossly disqualified juror. In a capital case at least counsel should be able to rely on prospective jurors answering questions with candor and not be forced to deal with each talesman as a hostile,

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[8] That case involved a trial on an indictment for rape. Under a guarantee of an impartial jury in the Tennessee Constitution, the conviction was invalidated on the ground that one juror had been a prosecuting witness in a trial for assault with intent to rape several years prior to his jury duty. That action had been placed on the "retired" docket some three years prior to the crime for which he was called as juror. On those facts, the court held that a legal presumption arises from the want of that impartiality which the Tennessee Constitution contemplates. Regarding the absence of additional evidence, it is stated at 160 A. L. R. 751:

"We have nothing to suggest an abatement of his interest in that case and its prosecution, nothing as to his connection with it or how close or otherwise his relationship to the wronged female. We are left to conjecture what elements of suggestive similarity exist between the facts of the assault in his case and those of the instant case. Certainly a presumption obtains that he entertained and still harbors a grievance against that other ravisher, intensified, perhaps, by frustration of his desire for vengeance. Surely, it requires no argument to convince that a man so circumstanced would not enter upon the trial of this accused free from that natural feeling of resentment which had moved him to institute and keep alive a prosecution for a like offense. As this case progressed his mind inevitably would turn to his own unsatisfied wrong and his judgment would be so affected thereby as to deprive him of the capacity to act impartially, disinterestedly, and dispassionately."

evasive witness.[9] This principle was especially applicable to the trial of appellant and his co-defendants the design of which was to have the jury pass on the essentially judicial question of sentence, life or death, instead of the traditional jury fact finding and determination of guilt or innocence. For that kind of trial the Fourteenth Amendment insists on the most impartial tribunal the reasonable needs of society will permit.[10] With Kuhnle a member of it, the DeVita-Grillo jury was not that sort because "One who has been assaulted, threatened with a deadly weapon and robbed is not likely to forget or forgive nor to treat lightly or even fairly similar conduct in others. This is a normal human reaction following customary behavior, expected and anticipated by the background of experience."[11]

The subsequently discovered undisputed facts make out colorable bias in a juror who was a part of the verdict which cause appellant and his confederate to be sentenced to death. The big practical difficulty with the proper resolution of the simple problem presented was that the shocking revelation about the juror came at a most inopportune time, long after this notorious trial had ended and the

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[9] In *Clark* v. *United States*, 289 U. S. 1, 11 (1933), Mr. Justice Cardozo, spoke of outright nullification of a proceeding where one of the jurors failed on the voire dire to come forward with information affecting her impartiality:

"There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a juror becomes a part or member of the court. *In re Savin*, 131 U. S. 267; *United States* v. *Dachis*, 36 F. 2d 601. The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning."

[10] In this connection in *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1926), it is said of a judge with a personal interest in the outcome of litigation:

"* * * a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

[11] From the then minority opinion in *State* v. *Grillo*, 16 N. J. 103, 116.

defendants had been sentenced. The appeals had been exhausted, nothing remained except the execution of the sentences. When the news finally did become public there was a refusal to accept it for what it was, namely, a weighty prejudicial occurrence that may have destroyed a fair trial and which cried out for correction. The closeness of Kuhnle's connection with the trial content is frightening. At the argument it was conceded that the trial court would have insisted that he be excused. The district judge frankly expressed his own opinion when he said to the state prosecutor (appearing for appellee), *"In fact I believe Judge Conlon himself would have disqualified him (Kuhnle)."* (Emphasis supplied.)

Kuhnle's was a far greater probable bias than that which, as we have seen, in several instances was recognized at the DeVita trial jury selection to be so serious it called for the direct excusing of talesmen. Yet the district judge ignored it as indicating no "unusual circumstances." That is the entire motivation of the district court opinion. It acknowledges that the basic issue "vigorously argued before this court" had been "submitted to the Supreme Court (of New Jersey)"[12] but denies the application for the writ on the state court theory that the facts do not "necessarily raise a presumption of partiality." In so doing on this record the inherent concept of a fair trial is repudiated. We cannot agree to that course. Nor can we agree to the proposition that a juror's privacy after verdict is invulnerable where the competing consideration is possible deprivation of human life. No policy is strong enough to prevent correction of errors of the nature outlined. The Supreme Court spoke cogently on that subject in *Clark* v. *United States*, *supra*, p. 16, saying: "No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reason-

[12] The state prosecution, specifically agrees with this. It states to us "that the constitutional question involved has been fairly considered by the

able firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." See *United States of America* v. *Luzzi*, E. D. Pa. Nov. 23, 1956.

In allowing the writ we reiterate what we have already said to the effect that the one disputed point at the trial of the defendants in the state court was whether the jury should recommend life imprisonment. We do not understand that there is a New Jersey procedure which will permit the retrial of appellant and Grillo on the question of sentence alone. If we are mistaken as to this the writ will be for the purpose of granting a new trial limited to that question. Otherwise a new trial will be generally allowed. In either event appellant will remain in the custody of the State of New Jersey.

The orders of the district court of July 14 and 15, 1955 will be reversed and the cause remanded to that court for the issuance of a writ of habeas corpus in accordance with the above outlined terms.

HASTIE, *Circuit Judge*, concurring.

I am in substantial agreement with the opinion of the court and add this brief concurrence only to emphasize those considerations which to me seem decisive in this case. This seems worthwhile because the role of the federal courts

in these challenges to the essential fairness of state criminal convictions is a particularly difficult one. It becomes our duty to distinguish between state action which we merely disapprove as unwise or undesirable, and that which in our best judgment is intolerable. It was the inherent difficulty in thus separating the intolerable from the merely undesirable which cause the division of this court in such cases as *United States ex rel. Darcy* v. *Henry*, 3d Cir. 1955, 224 F. 2d 504, and *United States ex rel. Smith* v. *Baldi*, 3d Cir. 1951, 192 F. 2d 540. It divides us again here. Accordingly, I think it desirable to restate as precisely as I can the combination of circumstances which to me makes it intolerable that this death sentence should be permitted to stand.

As Judge McLaughlin has spelled out in greater detail, there came a time in the post-conviction proceedings in the New Jersey courts when this much was clear beyond any possible need for additional inquiry or fact finding.

1. The primary responsibility of the jury in this murder trial was to choose between the death penalty and life imprisonment as the appropriate punishment for defendants who for all practical purposes had conceded their guilt of homicide in the commission of armed robbery.

2. A few blocks from the place of this robbery-homicide, and only eight months earlier, juror Kuhnle had been the victim of an armed robbery. Moreover, his work as night manager of a telegraph office involved the responsibility of frequently taking deposits of money to the bank late at night. The continuing substantial risk of armed robbery to which Kuhnle was thus subjected had been dramatized and emphasized by providing him with a police escort.

3. During the interrogation of prospective jurors many questions were addressed to various talesmen which showed that any past connection with armed

robbery was a matter of special concern. Hearing these questions must have made crystal clear, to Kuhnle, what the dictates of average intelligence should in any event have suggested; namely, that in response to the general inquiry made of all jurors concerning possible disqualifying circumstances, he should have disclosed for the evaluation of the court and counsel his recent dramatic and impressive experience with an actual armed robbery and precautions against the danger of recurrence.

4. In addition, as Judge McLaughlin has also pointed out, the prosecutor's appeal to the jury, climaxing other items of similar purport, was worded and calculated to make the jurors apprehensive for their own safety from armed robbery, and to induce them to judge the appropriate punishment of the defendants in the light of the jeopardy in which they themselves stood because of such evil doers.

To me it is inconceivable that Kuhnle's own experience, as emphasized and brought vividly to mind by the government's case and the prosecutor's appeal, could have left this juror capable of objective determination of the appropriate punishment for these defendants. In these circumstances, it was fundamentally unfair and inconsistent with our concept of the unbiased administration of justice that Kuhnle should have participated in the decision whether the accused should live or die. Once this picture of one of the jurors was fully revealed, in the proceedings which followed conviction and sentence I think it was the duty of the New Jersey courts under the due process clause to order a new trial or a redetermination of the sentence. By the same token I think it is our duty now.

I am authorized to state that Chief Judge Biggs concurs in the views expressed herein.

KALODNER, *Circuit Judge*, with whom MARIS and GOODRICH, *Circuit Judges*, concur, dissenting:

With slight paraphrase this is the sum of the majority's position:

DeVita and his co-defendants signed confessions, admitted the facts, and actually had no defense to the charge of murder under the New Jersey felony-murder statute; they had offered to plead to the life-term offense; the one disputed point at their trial in the state court (New Jersey) was whether the jury should recommend life imprisonment; for that kind of a trial the Fourteenth Amendment insists on the most impartial tribunal the reasonable needs of society will permit; with Kuhnle a member of it, the DeVita-Grillo jury was not that sort because one who has been assaulted, threatened with a deadly weapon and robbed is not likely to forget or forgive nor to treat lightly even fairly similar conduct in others; the subsequently discovered undisputed facts (of Kuhnle's holdup, failure to disclose it at his voir dire examination, and his statement then that he didn't know State's officers or personnel) make out colorable bias in a juror who was part of a verdict which caused DeVita and his confederate Grillo to be sentenced to death; under the law as it is today, both federal and New Jersey, the admitted facts demonstrate bias to the extent that it voids the process.

Judge Hastie in his concurring opinion brings into even sharper focus his and the majority's conclusion that Kuhnle must be held as a matter of law so biased and prejudiced by reason of his own holdup experience that his participation in the petitioners' trial was in violation of due process. Said Judge Hastie:

> "To me it is inconceivable that Kuhnle's own experience * * * *could have left this juror capable of objective determination of the appropriate punishment for these defendants.* In these circumstances,

it was fundamentally unfair and inconsistent with our concept of the unbiased administration of justice that Kuhnle should have participated in the decision whether the accused *should live or die.*" (Emphasis supplied.)

In ruling that as a matter of law "the admitted facts demonstrate bias to the extent that it voided the [due] process" the majority fails to give proper weight to these indisputable critical facts:

(1) three men were involved in the felony-murder case, DeVita, Grillo and Rosania, and all were tried at the same time by the jury of which Kuhnle was a member; it was not just a "DeVita-Grillo" jury;

(2) the jury made a recommendation of life imprisonment with respect to Rosania although it did not do so as to DeVita and Grillo on their return of a verdict of guilty of murder in the first degree as to all three men.

In considering these facts the majority makes these three points:

(1) "• • • if the jury had consisted of twelve patently prejudiced people they still would have found a major differentiation between Rosania and the other defendants, DeVita and Grillo."

(2) DeVita and Grillo "• • • committed the holdup, Grillo firing the fatal shot."

(3) "Rosania, a former employee of the place which was robbed, had been in on the planning of the robbery *but* • • • *was not at the scene of the actual killing.*"

As to the first of these points it need only be said that "patently perjudiced people" do not make "differentiation[s], "major" or minor; it is the disregard of differentiating factors which is the hallmark of prejudice.

The second and third points may be considered together. The majority's statement that DeVita and Grillo "committed the holdup"; Rosania "had been in on the planning of the robbery" but "was not at the scene of the actual killing" is correct as far as it goes but it does not go far enough, as will be seen from the following undisputed facts.

Rosania had worked intermittently for brief periods in 1948, 1949 and 1950 for Universal Food Market. Some six weeks prior to the November 9, 1951 date he suggested to a group of which DeVita was a member that it would be "easy" to rob Universal. He subsequently further discussed the suggestion with DeVita and Grillo. In a reconnaissance or "casing" operation he worked at Universal on November 2, 1951 and reported the fruits of his observations to DeVita and Grillo, specifically how Thomas Lofrano, manager of Universal, and James Law, its private policeman, nightly proceeded to deposit Universal's daily receipts at a nearby bank.

On the evening of November 9, 1951, Rosania, DeVita and Grillo proceeded to the Delaware, Lackawanna and Western Railroad station where was stored in a locker Grillo's brief case containing revolvers and ammunition. Rosania and DeVita went into the station and got the brief case. Rosania carried it out to Grillo and opened it. DeVita took from it a 32 automatic and Grillo a Beretta automatic; the murder weapon. Rosania then took the brief case back to the locker. The three men then proceeded to the Universal Food Market. They sat on a bench in the park facing the market and perfected the plan of operations. Rosania made a search for Law's car in a parking lot adjacent to the Universal Market but could not find it. He later pointed out Lofrano and Law while they moved about in the market. He then left after having arranged with DeVita and Grillo to call him at a diner after the holdup was completed. Some 10 or 15 minutes later Lofrano and Law emerged from the market, the former

carrying a paper bag containing the day's receipts (some $5,000 in cash) and Law walking behind him. Reaching his car Law entered and sat in the driver's seat; Lofrano sat to his right. Grillo went to Law's side of the car with drawn revolver; DeVita to Lofrano's side with drawn revolver. This is a stickup, they said. It was at this juncture that Grillo's gun was fired and Law was fatally wounded, dying about two hours later. Grillo grabbed the money bag and he and DeVita fled the scene. Later they contacted Rosania and he picked them up in a friend's car. When DeVita phoned Rosania he asked what happened in the robbery. Several days later the three men were arrested, they confessed, some of the proceeds of the theft were discovered and the murder weapon recovered.

All three men at the beginning of their trial sought to enter pleas of non vult or nolo contendere to the crime of murder in the first degree; the State's attorney refused to agree because under New Jersey law the maximum punishment under such plea would be imprisonment for life.

DeVita's counsel and Grillo's counsel in their summations to the jury frankly conceded that their clients must be found guilty of murder in the first degree but pleaded for a merciful life imprisonment recommendation—DeVita on the grounds of youth; he "had not drawn his gun"; he did not intend there should be gunplay or a killing—Grillo on the grounds that he had not intended to shoot Law; his gun went off accidentally.

Rosania's counsel make a plea to the jury for acquittal on the ground that he had withdrawn from the holdup plan before the crime took place and that he had attempted to dissuade DeVita and Grillo from going through with the holdup. Incidentally, both DeVita and Grillo denied the latter and their testimony further established Rosania's participation in the plotting of the holdup up to the very moment he departed because he feared recognition by former fellow employees of Universal.

The trial judge instructed the jury that if they believed Rosania's contention that he had withdrawn from the holdup plan before it was consummated he must be acquitted. The jury's verdict of guilty as to Rosania demonstrated its rejection of the withdrawal contention. Its recommendation of life imprisonment certainly cannot be said to be due to a warranted "major differentiation between Rosania and the other defendants, DeVita and Grillo" because, as the majority puts it, "The latter two committed the holdup, Grillo firing the fatal shot."

As the trial judge properly charged the jury, the crime of all three men was of a piece if Rosania had not withdrawn from the holdup plan before the shooting, and his mere absence from the scene at the time of the shooting was not a critical circumstance. The fact that the jury made a merciful recommendation of life imprisonment amply demonstrates that it was not a prejudiced jury; far from that fact, it could well be said, under the circumstances overwhelmingly established by the evidence, that it was indeed merciful to a fault.

Kuhnle's participation in the merciful recommendation is eloquent testimony of an absence of prejudice on his part in the DeVita-Grillo-Rosania trial and is a dispositive answer to the critical focal point of the majority's position that the only real issue at the trial of the defendants was "whether the jury should recommend life imprisonment" and that Kuhnle was so biased and prejudiced that he could not have fairly decided that issue.

The majority's determination that Kuhnle was so biased as to pollute the stream of justice in violation of due process seems to me to be insupportable in view of the fact that he and the jury of which he was a member recommended life imprisonment for Rosania.

"The assurance of an impartial tribunal" says the majority, "is to vital to be subjected to speculation con-

cerning the quantum of prejudice flowing from this grossly disqualified juror."

Does not the recommendation as to Rosania obviate any necessity for "speculation concerning the quantum of prejudice flowing from this grossly disqualified juror" and does not that recommendation demonstrate that the majority erred in describing Kuhnle as "this grossly disqualified juror?"

It is not amiss to note that it was Rosania's counsel who had asked Kuhnle whether he knew any of the "State's officers or personnel" and in the light of Kuhnle's joining his fellow jurors in the merciful life imprisonment recommendation as to Rosania, it is difficult to see how the majority can find fraudulent concealment or bias because of Kuhnle's negative answer to that question.

This may be a proper place too, to note that the majority's statement that "* * * it is now shown that he [Kuhnle] *knew a number of Newark police* since he ordinarily called for a police escort each night * * *" is based on surmise and surmise only. The only evidence on the score of Kuhnle's contact with policemen—contained in the newspaper clipping relating to his holdup—was that *prior* to it he "ordinarily called for a police escort each night" and that subsequent to it he was interrogated by three detectives in the usual routine investigation. It would be just as reasonable to assume that it was the same policeman—covering his beat—who was Kuhnle's escort when he had one, and such a probability ought not to be summarily rejected in favor of a surmise which would provide the premise for branding Kuhnle as a scheming perpetrator of a fraud on the judicial process with three men's lives at stake in the offing.

Of the same fabric is the majority's premise that Kuhnle deliberately and fraudulently concealed his own holdup experience.

On this score the majority has this to say:

"Juror Kuhnle was the tenth talesman called and the fifth juror accepted. An earlier prospective juror had been queried on previous robbery experiences. Kuhnle's attention was directed to the questions put to the other panel members but he did not disclose that he had recently been held up and robbed."

That statement certainly fails to place in proper perspective the incident discussed.

This is what the record discloses actually happened.

During the morning session of the first day of the DeVita-Grillo-Rosania trial nine prospective jurors were examined in considerable detail by three attorneys who separately represented the defendants, counsel for the State, and the presiding judge. Talesman No. 6, was asked the question "Has anyone ever attempted to commit a robbery against you or any other member of your family." The answer was "No, sir". The first five talesmen were not asked that question or anything resembling it nor were talesmen Nos. 7 and 8 who were subsequently examined prior to the luncheon recess.

Kuhnle—talesman No. 10, was the first juror examined at the afternoon session. After he had been questioned at some length by Grillo's counsel and State counsel he was interrogated by DeVita's counsel. The latter in the course of his examination questioned him as follows:

> "Q. You heard the interrogations this morning, did you not?
> "A. Yes, sir.
> "Q. And I assume you followed them?
> "A. Yes."

The foregoing makes it quite clear that Kuhnle's attention was not specifically directed to the question put to talesman No. 6 relating to any robbery experience, although

the majority's statement as to the incident might be so construed.

It may be noted parenthetically that of the seventy-one talesmen examined after Kuhnle only six were asked a specific question as to robbery experience. Thus out of a total of eighty-one talesmen called for voir dire examination only seven were questioned as to robbery experience.

Coming now to the majority's reference to the prosecutor's summation to the jury in which he stated: "Why, they would stick you up, Mr. Juror No. 6, and you, Mrs. Carrabant, and you Mr. George * * *"[1] As to that incident the majority states: "After that amazing, violent assertion to the jury by the prosecutor, vividly reminding Kuhnle of his own ordeal, how could the latter have functioned other than short of the constitutional standard of impartiality".

The jury's recommendation of life imprisonment as to Rosania is a dispositive answer to the apprehensions expressed in the majority's rhetorical questions and by Judge Hastie.

Even independent of the circumstances that the jury's extension of mercy to Rosania demonstrated absence of bias, prejudice and fraud on Kuhnles' part, I could not subscribe to the majority's view (and that of Judge Hastie) that what was said or left unsaid by Kuhnle evidenced fraudulent concealment, bias, and prejudice as a matter of law without more.

The Essex County Court, Law Division, of New Jersey, held that fraud could not be imputed to Kuhnle as a matter of law. On appeal, after an extensive review, the Supreme Court of New Jersey affirmed, under the caption *State* v. *Grillo*, 16 N. J. 103 (1954).[2]

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[1] Kuhnle was Juror No. 5.

[2] 106 A. 2d 294 (1954).

Appendix A—Opinion of the Court.

The District Court following two hearings and an examination of the entire record reached these conclusions:[3]

> "But there is no evidence that Kuhnle was not an impartial juror in that his deliberations or vote or those of his fellow jurors were influenced by the robbery incident. Nor is there any evidence from which to infer that Kuhnle was a biased juror. There is no proof that he intentionally deceived counsel into accepting him as a juror. * * * The fact that eleven months prior to the trial Kuhnle was a robbery victim is not a disqualification as a matter of law; there is no proof of actual bias nor of facts from which to infer bias; there is no proof that Kuhnle intentionally concealed any information, or intentionally misled counsel."

Thus, prior to reaching this court, three courts, the lower and appellate courts of New Jersey and the District Court, held that the record did not and could not support a judicial determination that fraud could be imputed to Kuhnle as a matter of law as the majority and Judge Hastie now declare. It may be observed parenthetically that the conclusion noted was reached even without expressed consideration of the fact that the Kuhnle jury had extended mercy to Rosania.

In this connection it is of more than passing interest that counsel for DeVita in the instant appeal in his reply brief (page 2) stated:[4] "While there may be an honest difference of opinion as to whether the evidence from the state court record is sufficient to establish the allegations of fraudulent concealment as set forth in the petition * * *."

Implicit in the majority's determination and that of Judge Hastie in this case is the concept that man is made

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[3] 133 F. Supp. 169, 176, 177, 178 (D. C. N. J. 1955).

[4] Filed with this Court February 3, 1956.

of such stuff that he will balk at nothing to reek vengeance even unto death upon any of a class which has wronged him—he will be oblivious to the divine teaching "Vengeance is mine, I will repay, saith the Lord"—he will stealthfully and cunningly conceal his vengefulness even to the point of breaking his solemn oath as a juror—that these unworthy human attributes are so patent that courts must take judicial notice of them and hold as a matter of law that they exist and cannot be curbed—this though there is absent a single shred of evidence to sustain such a determination in a particular case.

I cannot subscribe to such an indictment of man. In holding Kuhnle as a matter of law guilty of fraudulent concealment and bias to the extent that he would exact death as a vengeance for his holdup almost a year earlier, the majority has stripped from him the presumption of innocence which the law places as a cloak of protection even about one who stands trial on the charge of murder.

The New Jersey Supreme Court dwelt at length on the focal points of Kuhnle's voir dire examination in its opinion in *State* v. *Grillo, supra,* as did the District Court, and it would serve no useful purpose to repeat there what they said.

DeVita's appeal is based on the premise that the District Court erred in two respects (1) it failed to impute fraud to Kuhnle as a matter of law; and (2) it did not afford him a hearing at which he could adduce testimony to establish actual fraud. The first point has already been discussed. As to the second, only this need be said—DeVita made no offer in the District Court (nor has he here) sufficient to raise factual questions. All he did in the District Court was to make an offer to go on a fishing expedition in uncharted waters which in his opinion *might* yield a "catch" of helpful evidence.

That is clearly manifest from his counsel's statement at the April 25, 1955 hearing held by the District Court on the remand (p. 32 N.T.):

"• • • We want a hearing, because we had no opportunity and the state court should have ordered that hearing to examine Kuhnle in detail—whom did he know; how many police did he know; what detectives did he know; were they the same detectives and police that were in the DeVita-Grillo case? That we want to know, unless your Honor is satisfied from the record that there was fraud committed."

Mere speculation on the part of a petitioner that a juror *may have* intentionally concealed a material fact will not justify his recall, years later, to determine his state of mind at the time of his voir dire examination. Unrestricted inquiries into the mental processes of jurors long after they have completed their function as such can only ultimately lead to the destruction of the jury system. *United States ex rel. Darcy* v. *Handy*, 203 F. 2d 407, at 419 (3rd Cir. 1953). Ample opportunity is given through the medium of the voir dire for both sides to search out the juror, and in the absence of affirmative proof that there has been a fraud committed, no post-trial harassment of the juror should be permitted. *United States* v. *Davers* v. *Hohn*, 198 F. 2d 934, at 938 (3rd Cir. 1952).

For the reasons stated I would affirm the judgment of the District Court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,726.

UNITED STATES OF AMERICA, *ex rel.*
SILVIO DeVITA,
Appellant,

vs.

LLOYD W. McCORKLE, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISON AT TRENTON, NEW JERSEY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: BIGGS, *Chief Judge,* and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of July 14 and 15, 1955 of the said District Court in this case be, and they are hereby reversed, and the cause remanded to that Court for the issuance of a writ of habeas corpus in accordance with the terms outlined in the opinion of this Court.

Attest:

HARRIET G. HUMPHREYS,
Chief Deputy Clerk.

August 6, 1957.

Appendix B—Amended Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,726.

UNITED STATES OF AMERICA, *ex rel.*
SILVIO DeVITA,

Appellant,

vs.

LLOYD W. McCORKLE, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISON AT TRENTON, NEW JERSEY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: BIGGS, *Chief Judge*, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

Amended Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of July 14 and 25, 1955 of the said District Court in this case be, and they are hereby reversed, and the cause remanded to that Court for the issuance of a writ of habeas corpus in accordance with the terms outlined in the opinion of this Court.

Attest:

HARRIET G. HUMPHREYS,
Chief Deputy Clerk.

August 19, 1957.

Appendix B—Order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,726.

UNITED STATES OF AMERICA, *ex rel.*
SILVIO DeVITA,

Appellant,

vs.

LLOYD W. McCORKLE, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISON AT TRENTON, NEW JERSEY.

Present: BIGGS, *Chief Judge,* and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges.*

Order.

Through inadvertence the date of one of the two orders of the district court to be reversed is stated in the last paragraph of the opinion as July 15, 1955. That date should be July 25, 1955. Therefore on page 16 of the slip opinion in the first line of the last paragraph of the opinion which now reads: "The orders of the district court of July 14 and 15," the numeral "1" immediately preceding the "5" on said line will be stricken and in its place and stead the figure "2" will be inserted so that the line will then read: "The orders of the district court of July 14 and 25,".

By THE COURT,
McLAUGHLIN,
Circuit Judge.

Dated: August 16, 1957.

Office - Supreme Court, U.S.
FILED
SEP 25 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 445

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1956

No. 445

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,

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v.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The majority and dissenting opinions in the Court of Appeals have not yet been officially reported but are appended to the petition for certiorari (Pt. pp. 23 to 51).

The opinion of the United States District Court, District of New Jersey, reversed by the Court of Appeals, is reported in *United States, ex rel. DeVita* v. *McCorkle*, 133 F. Supp. 169.

The opinion of the Supreme Court of New Jersey is reported in *State* v. *Grillo*, 16 N. J. 103, 106 A. 2d 294 (1954).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the fraudulent concealment by a juror on the *voir dire* of material facts pointing to bias and prejudice vitiates a conviction as a denial to the respondent of due process of law?

Constitutional Provision Involved

The Petition sets forth under this caption the pertinent provisions of the Fourteenth Amendment to the Constitution of the United States involved in this case.

Statement

Respondent Silvio DeVita, Joseph Grillo and Ralph Rosania were convicted in the Essex County Court of New Jersey of first degree murder arising out of an armed robbery. Since there had been no recommendation for mercy by the jury as to the defendants DeVita and Grillo, under the New Jersey State Law the conviction carried mandatory death sentences. N.J.S. 2A:113-4. As to defendant Rosania the jury recommended life imprisonment. Thereafter, some time in March, 1954, evidence came to light for the first time which indicated that one of the jurors in the trial in which the present respondent was convicted and sentenced to death, had fraudulently concealed from the Court and counsel atrociously disqualifying facts pointing to bias and prejudice against the respondent in order to impose himself upon the jury.

The facts indicating the foregoing are as follows: The trial was moved on February 25, 1952, and the respective jurors were examined on their "voir dire" beginning on that date. Among the jurors who were examined and fi-

nally accepted to serve on the jury, was one Arthur Kuhnle, who was employed as a night manager for the Western Union Telegram Company on February 25, 1952, and had been so employed for a long time previous to that date. During the night of March 30, 1951, Arthur Kuhnle, while taking a deposit from the Western Union Office to be deposited in the National State Bank on Broad Street, Newark, New Jersey, was "stuck up" at the point of a gun and robbed of the money which he was carrying. This information was not known to the respondent or his counsel at the time the jury was being selected, nor at any time during the trial of the case. When questioned on his *voir dire*, Arthur Kuhnle did not disclose but concealed the fact that he had been the victim of a "stick up" only about eleven months before. The record of the *voir dire* examination discloses the following: The same juror not only failed to disclose that he had been the victim of a holdup but he failed to truthfully answer the question as to whether he knew any of the State's officers or personnel (108a).* Promptly upon the discovery of the above facts concerning the holdup and the robbery of juror Kuhnle, which discovery did not occur until March 1954, the respondent by his attorney moved for a new trial in the State Court. The motion for a new trial was denied by the County Court. The New Jersey Supreme Court affirmed, two Justices dissenting. *State* v. *Grillo*, 16 N. J. 103.

On August 16, 1954, respondent filed in the United States District Court a petition for a writ of Habeas Corpus (2a to 18a). On the same day the District Judge dismissed the application but he issued a certificate of probable cause and a stay of execution until August 19, 1954. On August 18, 1954, the Court of Appeals granted a stay of execution pending the disposition of the appeal.

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* Numeral references, unless otherwise indicated, are to the pages of the typewritten Appendix submitted to the Court of Appeals.

U. S. v. *McCorkle*, 214 F. 2nd 823 (1954). On November 19, 1954, the Court of Appeals reversed the order of the District Court of August 16, 1954, and remanded the cause for further proceeding not inconsistent with its opinion. *U. S.* v. *McCorkle*, 216 F. 2nd 743 (1954).

Thereafter the District Court granted leave to the respondent to amend the application for habeas corpus by inserting at the end of paragraph 10 thereof the following (19a):

> "10a. The aforesaid actions of concealment and deception on the part of juror Kuhnle were a fraudulent perpetration and imposture whereby the trial tribunal, its powers and responsibilities fell pro tanto into the hands of a juror who had no lawful right to be a member of the tribunal and who was able to insinuate himself there only by deception and fraud. Thereby any proceedings or judgment affecting this applicant were rendered null and void and were taken without jurisdiction."

No denial by affidavit or otherwise was ever filed by the State to respondent's charges.

Thereafter, on July 14, 1955, the District Judge filed an opinion denying the application. *U. S.* v. *McCorkle*, 133 F. Sup. 169 (1955). On appeal to the Court of Appeals oral argument was had before a three judge court and thereafter, pursuant to the order of the court reargument was had before the court *en banc*. On August 6, 1957, by a vote of 4 to 3, the Court of Appeals reversed the judgment of the District Court and directed the issuance of a writ of Habeas Corpus to the end that a new trial be allowed (Pt. p. 38).

ARGUMENT

1. Petitioner contends (Pt. pp. 10-12) that because juror Kuhnle was not asked the specific question as to whether he or any member of his family had ever been the victim of a robbery, he was not under any duty to disclose his recent robbery experience and his failure to disclose could not be said to have been intentional or wilful. However, the record of the *voir dire* discloses the following: The sixth talesman to be examined on the *voir dire* was expressly asked whether he had been the victim of an armed robbery (100a). After recess the tenth talesman to be examined was Arthur Kuhnle. He was asked the following question (101a):

> "Q. You heard the interrogations this morning, did you not? A. Yes, sir.
>
> Q. And I assume you followed them? A. Yes.
>
> Q. Let me repeat to you my position with reference to the client I represent, Mr. DeVita. I am interested in only one thing in this inquiry into the competency of the jurors and that is that the jury who finally occupy the box to try this case is open minded, free of any prejudice of any kind, nature or description whether it be because the man who was killed was a policeman or an officer of the law, whether the nationality of the defendants—anything at all that you might think of that would prejudice you? A. I would have no prejudice at all."

Despite these questions Kuhnle failed to disclose the fact that less than eleven months previously he had himself actually been the victim of an armed robbery which moreover was strikingly similar to the robbery involved in the present case, both robberies being street hold-ups in downtown Newark of persons carrying employer's funds to a downtown bank (6a, 71a).

Shortly after the examination of juror Kuhnle on the *voir dire*, another prospective juror, Miss Nora Graf, within the presence and hearing of Kuhnle who had now been accepted and sworn as a juror and who was sitting in the jury box, was challenged by the defense which disclosed that she or a relative had been a victim of a robbery many years before (102a). The record of the *voir dire* examination also shows that five additional talesmen examined after Kuhnle, in his presence and hearing, were asked the armed robbery question (102a, 103a); that the talesman examined immediately after Kuhnle volunteered that his office had recently been burglarized (101a). Without exception each of these prospective jurors who showed any sensitivity on the subject were challenged by the defense (101a to 104a). In addition, juror Kuhnle heard the Judge excuse a prospective juror who had informed the Judge that he carried considerable money in his business for his employer (104a). Notwithstanding all these additional incidents juror Kuhnle throughout preserved his deceptive silence as to his own recent victimization by armed robbers.

While the basic facts of criminal guilt were in effect conceded by the defense at the trial (*State* v. *Grillo*, 11 N. J. 173, 186) the state record shows that virtually every talesman including juror Kuhnle were expressly and meticulously examined by the defense on the *voir dire* as to his fair and impartial ability to afford to one or more of the defendants the benefit of the State's statutory life imprisonment jury recommendation (118a to 120a). The importance of this factor in the case is accented by the circumstances of the extreme youth of all three of the defendants in the state trial, the derivative foundation of the State's murder charge (felony-murder rather than premeditation), the conceded fact that only one (Grillo) of the three defendants fired the weapon, and the uncontradicted defense testimony that the firing was unintentional (*State* v. *Grillo*, 11 N. J. 173, 179).

Kuhnle's fraudulent concealment of his then quite recent experience as a victim of a robbery effectively cut off the defense on the *voir dire* from exploring into a situation which under the facts which have since come to light points to a fraudulent calculation, vindictiveness, partiality and prejudice on Kuhnle's part.

The petitioner's argument we submit is fully answered by Justice WACHENFELD of the New Jersey Supreme Court when, in his dissenting opinion (16 N. J. 103, 116), he stated:

> "* * * One who has been assaulted, threatened with a deadly weapon and robbed is not likely to forget or to forgive nor to treat lightly or even fairly similar conduct in others. This is a normal human reaction following customary behavior, expected and anticipated by the background of experience. . . .
>
> "Counsel were endeavoring to secure jurors who had not been embittered by having been subjected to the same treatment which was the basis of the charge pending against the accused. They made it quite clear they were trying to avoid triers of fact who had suffered [illegible]like factual experience.
>
> "That was the kind of jury the defendants were entitled to but were unsuccessful in obtaining, as evidenced by the disclosures after trial.
>
> "A life should not be taken by legal process unless every reasonable doubt is resolved in favor of the condemned, and unless the best judicial procedure has been 'rigidly and jealously enforced,' *State* v. *Auld*, 2 N. J. 426, 442 (1949), dissenting opinion."

2. Petitioner further contends (Pt. 19-20) that Kuhnle answered truthfully to the following question:

> "Q. You don't know any of the State's officers or personnel? A. No, sir."

Petitioner adopts the view of the majority of the New Jersey Supreme Court, *State* v. *Grillo*, 16 N. J. 103, 115, that "State's officers or personnel" meant State of New Jersey officials or employees and not City of Newark police or County of Essex officials. It is submitted that this summary consideration of the matter is not a fair treatment of the respondent's charge.

The question is whether the words "The State" would likely mean to the juror "the prosecutor" or whether Kuhnle thought the defense lawyer was concerned with officials in Trenton which the State Supreme Court considered the reaction of a reasonable person.

Kuhnle was the first talesman questioned in the afternoon of the first day's proceeding. During the morning's proceedings he heard the Court and counsel refer to the prosecutor as "The State" no less than 41 times. In addition the prosecutor was referred to as "The State" 8 times (including a repeat question) in the questioning of Kuhnle himself. Indeed, the words "The State" and the "prosecution" were used interchangeably in Kuhnle's questioning. For instance, a question was posed to him in terms of the "prosecution" while almost immediately thereafter the Assistant Prosecutor propounded practically the identical question in terms of "The State" (74a).

In view of the obvious concern of the defense for the weeding out of jurors who had anything to do with law enforcement (over 30 talesmen were interrogated on the subject) and in view of the fact that Kuhnle himself was asked if any member of his immediate family were "connected in any way with any law enforcement agency" (108a), we submit that Kuhnle understood the question as it was posed. If he did not understand it he was clearly in duty bound to so indicate.

In any event, the State Supreme Court shrugged off the whole matter by stating, at 16 N. J. 103, 115 (133a):

"Even so, * * * there is no evidence that the subject matter created bias, prejudice, or partial status in the mind of the juror". In other words, the fact that Kuhnle may have known officers or personnel who had a hand in the presentation of the State's case was not prejudicial. Even if this conclusion was correct we say the respondent's main complaint is not that Kuhnle may have known any of these people but that he falsely denied knowing them.

It is submitted that petitioner's contention is without merit and is fully answered by Judge McLaughlin, speaking for the majority, when he stated (Pt. p. 32):

> "* * * On this allegation that court, while it inferred that Kuhnle probably did not understand the query to include employees of the county—like the prosecutor or of the city—like the police, could not close the door to the inclusiveness of the phrase. In its dilemma the whole subject of Kuhnle knowing one or more of the law enforcement people connected with the State's case was eliminated by the comment that assuming such relationship there was no evidence it caused Kuhnle to be prejudiced. With the possibility of this grave condition admitted, the state court may have been content in that decision to forget about it as it had regarding the admitted possibility of bias stemming from the robbery discussed above. However under *Brown* v. *Allen, supra,* we cannot do that for it would be monstrous to pretend that the state has given fair consideration to this part of the prejudice claim and reached a satisfactory conclusion."

3. Petitioner also contends (Pt. p. 16) that Kuhnle's failure to disclose the fact of his armed robbery experience did not disqualify him as a juror "as a matter of law". This contention loses sight of the well settled law that the right to a fair and impartial jury is a part of due process. *Buchalter* v. *New York*, 319 U. S. 427 (1943); *Chambers* v. *Flor-*

ida, 309 U. S. 227, 236-237 (1940); *United States* v. *Wood*, 299 U. S. 123 (1936); *Baker* v. *Hudspeth*, 129 F. 2d 779 (C. C. A. 10, 1942), cert. den. 317 U. S. 681, reh's den. 317 U. S. 711, 318 U. S. 800.

The law is well settled that where evidence that a juror fraudulently concealed a material fact on the *voir dire* is substantiated, it is the duty of the trial judge to discharge the entire jury and the proceedings theretofore held are a nullity so that the defendant may be put to another trial without placing him in double jeopardy. *Hedger* v. *State*, 144 Wis. 279, 128 N. W. 80 (1910); *In re Ascher*, 130 Mich. 540, 90 N. W. 418 (1902); *State* v. *Bell*, 81 N. C. 591 (1879); *State* v. *Washington*, 89 N. C. 535 (1883).

The cases are legion which hold that a verdict may be challenged where discovery is made that a juror concealed a disqualification or incompetency which was not known beforehand.

The principle just stated is peculiarly apposite where the later-discovered ground of disqualification is bias and prejudice. *Remmer* v. *United States*, 350 U. S. 377 (1956); *Wright* v. *Bernstein*, 23 N. J. 284 (1957).

The effect of a juror's fraudulently obtaining his position on the jury has been characterized by this Court in language suggesting that outright nullity of the entire proceeding results therefrom. *Clark* v. *United States*, 289 U. S. 1, 11 (1933).

As was remarked by Mr. Justice FIELD in a case where the Court voided a penitentiary sentence as wholly beyond the jurisdiction of the sentencing judge to impose, "The laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized." *Re Bonner*, 151 U. S. 242, 259 (1894).

No more than a judge's should a juror's finger weigh unlawfully upon any man or point him, unlawfully, even to a doom which were otherwise lawful.

In a death case, that effort is but reasonable which is utmost, to ensure that the law shall afford to the defendant its even-handed benefits as it poises over him its even-handed penalty.

The petitioner's contention as to Kuhnle's impartiality, we submit, is based on speculation. Judge McLaughlin, speaking for the majority, properly set forth the principle which must govern a criminal case when he said (Pt. p. 35):

> "* * * The assurance of an impartial tribunal is too vital to be subjected to speculation concerning the quantum of prejudice flowing from this grossly disqualified juror."

CONCLUSION

The case was correctly decided below. The petition for writ of certiorari does not present any question meriting further review by this Court.

We, therefore, respectfully submit that it should be denied.

Respectfully submitted,

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Attorney for Respondent,
Silvio DeVita.

Isadore Glauberman,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

DOCKET No. 445.

LLOYD W. McCORKLE, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* SILVIO DeVITA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl C. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Lloyd W. McCorkle, Principal Keeper of the New Jersey State Prison at Trenton, New Jersey, your petitioner, prays that this Court grant rehearing of its Order of November 12, 1957, denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in the above-entitled case as prayed for in the petition filed September 9, 1957, herein.

Reasons for Rehearing of Order Denying Petition for Certiorari.

1. We deem it necessary to present to the Court a very brief summary of the procedural steps undertaken in this case.

On March 12, 1952, Silvio DeVita, Joseph Grillo, and Ralph Rosania were tried and convicted of murder in the first degree in the Essex County Court, New Jersey, the crime being a felony-murder, the killing of James Law, a special police officer, on November 9, 1951, in Newark, New Jersey, committed during the perpetration of robbery.[1]

The jury, by its verdict, recommended life imprisonment as to Rosania only, but there was no recommendation as to DeVita and Grillo who were sentenced to the death penalty.

The judgment of conviction was affirmed by the New Jersey Supreme Court (*State* v. *Grillo*, 11 N. J. 173, 93 A. 2d 328); and this Court denied certiorari. (*DeVita & Grillo* v. *New Jersey*, 345 U. S. 976, 73 S. Ct. 1123).

Thereafter DeVita undertook two successive habeas corpus proceedings culminating in this Court without success, one involving an attack upon the manner of polling the trial jury and the sentence imposed (See *In re DeVita*, 27 N. J. Super. 101; *In re DeVita*, 13 N. J. 341; certiorari denied 346 U. S. 923, 74 S. Ct. 309); and the other an application to this Court for leave to file a writ of habeas corpus based upon the Charter of the United Nations, which

[1] The deceased was killed while in the act of escorting the manager of a super-market to a bank to deposit a substantial sum of money for his employers.

was denied. (See *DeVita* v. *McCorkle*, 347 U. S. 926, 74 S. Ct. 534).

Beginning on March 15, 1954, both DeVita and Grillo commenced another round of proceedings in the New Jersey courts, claiming they were denied a fair and impartial trial because of the presence on the trial jury of one Arthur Kuhnle who was discovered after trial to have been himself a victim of armed robbery.[2]

The trial court denied a new trial, and on appeal the New Jersey Supreme Court, after considering and determining the constitutional questions involved, affirmed the denial of a new trial. (See *State* v. *Grillo*, 16 N. J. 103.)

Execution of DeVita and Grillo was fixed for the week of August 15, 1954.

It is important to note that immediately prior to that date, on August 13, 1954, counsel for DeVita served upon the county prosecutor a notice of application they intended to make to this Court for a stay of execution in order to permit the filing in this Court of a petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court, it being stated in paragraph 1 of said application that:

> "This application is made in conjunction with a petition which the applicant intends to file promptly with this Court for certiorari to review a certain final state court judgment which is hereinafter more fully described. If the stay of execution of sentence of death herewith applied for is granted by this Court, the applicant will file his petition for certiorari as

(2) Juror Kuhnle was the victim of a robbery on March 31, 1951, almost a year before the murder trial.

aforesaid within the time prescribed by law, or at such time as this Court may direct."

On or about August 13, 1957, counsel for DeVita proceeded to Washington, D. C. for the purpose of presenting an application for a stay of execution pending their avowed intention of filing a petition for certiorari in this Court.

Although the county prosecutor was not present at the time of the application for a stay of execution, he was reliably informed that the application for a stay was presented to the Honorable Associate Justices Hugo L. Black, Robert H. Jackson and Tom C. Clark, and upon considering the merits of the application which was based upon the presence on the jury of Arthur Kuhnle, and which contained all of the details in connection with the alleged bias and prejudice of said juror as has been considered and determined by the New Jersey Supreme Court, each of the named Associate Justices denied a stay of execution.

On August 16, 1954, apparently abandoning any intention of filing in this Court a petition for certiorari to review the New Jersey Supreme Court, DeVita filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey, in which he made the following significant statement in paragraph 21 of his petition:

> "As regards petitioner's right to petition to the Supreme Court of the United States for a writ of certiorari to review the last-mentioned judgment of the Supreme Court of New Jersey, petitioner does desire to make such application to the Supreme Court of the United States, and in pursuance of this desire petitioner has attempted to obtain a stay of execution of his sentence of death in order to permit him

the opportunity of filing and prosecuting his petition for a writ of certiorari in the Supreme Court of the United States. Such application for a stay of execution pending the filing of a petition for a writ of certiorari has thus far proved fruitless."

On August 16, 1954, the same day of defendants' application for a writ of habeas corpus, the District Court judge, after examining the opinion of the New Jersey Supreme Court in 16 N. J. 103, dismissed the petition, but he issued a certificate of probable cause entitling defendants to an appeal.

On appeal, the Court of Appeals remanded the cause to the District Court for further proceedings directing that the Court examine and consider the "entire record" of the State courts pursuant to *Brown* v. *Allen*, 344 U. S. 443, 73 S. Ct. 397 (1953). (See *United States* v. *McCorkle*, 216 F. 2d 743).

Pursuant to the direction, the District Court, on remand of the case, thoroughly examined and considered the entire record of the New Jersey state courts, and it concluded that the federal questions involved had been adequately considered and determined by the New Jersey Supreme Court, and on July 25, 1955, the District Court dismissed the petition for habeas corpus. (See *United States* v. *McCorkle*, 133 F. Supp. 169).

On appeal, oral argument was had before a three-judge Court on February 9, 1956.

Thereafter a re-argument was had before the entire seven-judge Court of Appeals on January 9, 1957.

On August 6, 1957, and by amended judgment of August 19, 1957, the Court of Appeals reversed the judgment of the District Court and directed the issuance of a writ of habeas corpus to the end that a new trial be allowed.

The reversal by the Court of Appeals for the Third Circuit was by a vote of four to three.

This reversal was singularly adverse to the petitioner in a constant series of judicial reviews, in both the State and Federal Courts, since March 12, 1952, and on the identical question here presented since March 15, 1954, all of which reviews were initiated in behalf of the respondent.

While we cannot refer to any new and conflicting decision of another court of appeals, or any controlling Supreme Court decision since the filing of our petition for certiorari on September 9, 1957, we respectfully submit that the matters herein set forth as a ground for rehearing comes legitimately within the purview of Supreme Court Rule 58 (2) as a substantial reason for further consideration by this Court, although it was not previously presented in the petition heretofore filed and denied.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

CHARLES V. WEHR, JR.,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 (2) of the rules of this Court.

CHARLES V. WEBB, JR.,
Counsel for Petitioner.